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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TONY CORTINAS, JR.

PETITIONER

v.

PEOPLES SECURITY BANK OF MARYLAND, ET AL

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

The question in this case is whether a lien obtained by virtue of a judgment against a debtor and his wife is subject to being voided by virtue of Section 67 a. of the Bankruptcy Act, as to the debtor's interest in real property owned by the debtor and his wife as tenants by the entirety, when the wife did not file a bankruptcy petition.

PARTIES

Tony Cortinas, Jr.

Peoples Security Bank of Maryland

Donald C. Weinberg, Esq.

Kohlhaas, Garnier and Webb, P.C.

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STATEMENT OF JURISDICTIONAL GROUNDS

The date of the judgment rendered by the U.S. Court of Appeals for the Fourth Circuit for which this writ of certiorari is sought is March 24, 1982. By order entered April 26, 1982, a rehearing petition was denied. Jurisdiction to review the judgment by writ of certiorari is conferred upon the U.S. Supreme Court by 11 USC 47 c. and 28 USC 1254 (1).

STATUTE INVOLVED

11 USC 107 (a), Section 67 a. of the Bankruptcy Act.

§ 67 Liens and Fraudulent Transfers. a.

(1) Every lien against the property of a person obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition initiating a proceeding under this Act by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent.....

(3) The property affected by any lien null and void under the provisions of paragraphs (1) and (2) of this subdivision a. shall be discharged from such lien, and such property

and any of the indemnifying property transferred to or for the benefit of a surety shall pass to the trustee or debtor, as the case may be.....

STATEMENT OF THE CASE

In 1981, the appellant debtor petitioned the U.S. Bankruptcy Court for the Eastern District of Virginia to issue a show cause order against Peoples Security Bank of Maryland and its attorneys for collecting on a discharged debt based on what the appellant considered a void lien. This necessarily required the adjudication of the validity of the lien. The petition was denied by order dated March 24, 1981. Because the bankruptcy had been filed under the Bankruptcy Act of 1898, as amended, (the Act), That order was affirmed by the U.S. District Court for the Eastern District of Virginia by order entered August 12, 1981. The order of the U.S. District Court was affirmed by the U.S. Court of Appeals for the Fourth Circuit by order entered March 24, 1982, and a petition

for rehearing was denied by order entered April 26, 1982. The Court's attention is invited to the attached stipulation of facts. (Appendix A).

FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Federal jurisdiction was conferred upon the court of first instance by 11 USC 11.

ARGUMENT

The appellant respectfully suggests that the decision of the U.S. Court of Appeals for the Fourth Circuit is contrary to that of another circuit's in a similar fact pattern. Further, the decision in the case at bar, which was by a panel and the Court, is contrary to a decision made by another panel of the same Court.

This petition for a writ of certiorari is being filed because of the different treatment given by the fourth circuit

and the sixth circuit to tenants by the entirety property in the bankruptcy context, when only one tenant files a bankruptcy petition. Although the statute involved is the Bankruptcy Act of 1898 as amended, and not the Bankruptcy Code (i.e. the Bankruptcy Reform Act of 1978), the issue presented in this petition can reoccur in non-community property states pursuant to § 552 (f) (1) of the Code (11 U.S.C. 522).[1/] The cases exemplifying this disparate treatment are Harris v. Manufacturers National Bank of Detroit, 457 F. 2d 631 (6 Cir. 1972) and Phillips v. Krakower, 46 F. 2d 764 (4 Cir. 1931), which was cited in the opinion sought to be reviewed by

1. § 552 Exemptions
(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to which the debtor would have been entitled under subsection (b) of this section, if such lien is---
(1) a judicial lien; or

this petition. While the facts in Harris are not identical to those of Phillips v. Krakower, neither are those in the case at bar. The one thread of commonality they have is a joint debt, tenancy by the entirety, and one tenant filing a bankruptcy petition. In the case of Phillips v. Krakower, the holder of the jointly executed note sought relief from the bankruptcy court by way of lifting the stay and postponement of the discharge in order that she could obtain a joint judgment in state court prior to discharge and then levy on the property. In the Harris case the creditor relied upon a Michigan statute giving similar relief without the necessity of requesting anything of the bankruptcy court. In the case at bar, the creditor having already obtained its joint judgment, did not seek any relief from the bankruptcy court, even though the judgment was obtained

within four months prior to the filing of the bankruptcy petition at a time when the debtor was insolvent.

The Harris opinion cited Phillips v. Krakower, as did Judge Williams in the case at bar, and , in an analysis of pre-1938 bankruptcy law, set forth Congress' concern with the "legal fraud" that was being perpetrated by debtors in this situation when it enacted the Chandler Act. The Court said:

> "It is significant to note that when the 1938 Bankruptcy Act was enacted, Congress was fully aware of the unique problems which estates by the entirety present under federal bankruptcy law. It was argued before the house that the ability of the bankrupt to obtain a discharge of all provable debts without having to surrender certain nonassignable assets - including property held by the entirety - to the trustee in bankruptcy constituted a virtual fraud under the earlier Act. See Collier, supra, Vol 4A, para 70.03, at 37. In response to this criticism, Congress inserted, inter alia, the third paragraph of Section 70 (a) in the 1938 Act., 11 U.S.C. section 110 (a):
>
> > All property, wherever located, except insofar as it is property which is held to be exempt, in which the bankrupt has at the date

of bankruptcy an estate or interest by the entirety and which within six months after bankruptcy becomes transferable in whole or in part solely by the bankrupt, shall, to the extent it becomes so transferable, vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date of bankruptcy."

With Congress having chosen to provide only this limited form of relief from the problems which estates by the entirety create under the Bankruptcy Act, we do not believe that federal courts are empowered to adopt broader remedies promulgated by state courts, particularly when those state remedies directly conflict with the specific requirement of Section 17 or the Bankruptcy Act."

457 F. 2d at 636

Although the opinion of Judge Williams, the District Court judge, says that the bankruptcy judge ruled, and Phillips v. Krakower held, that entirety property is not "property of a person", the appellant respectfully suggests that not to be the case. Page 2 of his memorandum says: "...the court refused to hold the respondents in contempt deciding that the property involved, being held by Mr. and Mrs.

Cortinas as tenants by the entireties, did not come into the bankrupt's estate for the benefit of creditors and, thus, the property was unaffected by the bankruptcy proceedings." Phillips v. Krakower on the other hand had nothing to do with section 67 a. of the Act, since Phillips dealt with a post-petition judgment and section 67 a. deals with pre-petition judgments. It is for this simple but compelling reason that the appellant has attempted to distinguish the two apparently similar fact patterns. The fact that judgment was gotten prior to the petition's having been filed is what takes this case out of the rule of Phillips v. Krakower.

With regard to entirety property being not "property of a person", of course there are multiple owners; but the Act and the Code clearly indicate that the focus is on the owner, not the res. That is why Schedule B of the bankruptcy petition is headed:

"Schedule B- Statement of all property of bankrupt. Schedules B-1, B-3 and B-4 must include all property of the bankrupt as of the date of the filing of the petition by or against him. Schedule B-1-Real property. Description and location of all real property in which bankrupt has an interest (including equitable and future interests, community property, life estates, leaseholds, and rights and powers exercisable for his own benefit)."

The property of a person is his interest in the res. This concept is demonstrated in a Fourth Circuit case, Cheeseman v. Nachman, 656 F 2d. 60. The Virginia statute involved, section 34-4 of the Code of Virginia, 1950, as amended, provided:

> "§ 34-4. Exemptions Created.
>
> Every householder or head of a family residing in this State shall be entitled, in addition to the property or estate which he is entitled to hold exempt from levy, distress or garnishment under §§ 34-26, 34-27 and 34-29, to hold exempt from levy, seizure, garnishment or sale under any execution, order or process issued on any demand for a debt or liability on contract, his real and personal property, or either, to

be selected by him, including money and debts due him, to the value of not exceeding five thousand dollars .... (emphasis added)

The husband and wife each claimed one half the equity in their house which they owned as tenants by the entirety and listed it on their respective lists of exempt property. The U.S. Court of Appeals for the Fourth Circuit permitted this, thus allowing each to claim their respective interest as "his real property." That part of the decision was so unremarkable that the annotators didn't even headnote it. Since the Cheeseman bankrupticies were filed under the Code, and not the Act, it is much clearer that each person's interest constitutes property and as such succeeds to the trustee, under section 541 (c)(1)(A) of the Code (11 U.S.C. 541 (c)(1)(A)) which provides: ".....an interest of the debtor in property becomes property of the estate....notwithstanding any provision that restricts or conditions transfer of

such interest by the debtor;....".

As shown in the Harris case, one of the predecessors of Code section 541, viz. section 70 a. of the Act (11 U.S.C. 110a) makes it clear that entirety property was within the contemplation of Congress as property of a person when it enacted the Chandler Act in 1938, which vested title to entirety property in the trustee if it became transferrable by the debtor within six months after bankruptcy.

Thus, if the debtor got past the six month period wherein he was at risk without the property becoming transferrable by him, he had reached a safe harbor. In the post-1938 context then, it was not a fraud or a loophole, but the express intent of Congress to treat entirety property in this fashion.

It is apparent that Congress intended exempt property, which ipso facto does not come into the bankrupt's estate for the benefit of creditors, to be covered by

section 67 a. because section 67a. (3) provides "the property shall pass to the trustee or debtor, as the case may be" (emphasis added). The only property that could pass to the debtor is exempt property. As set forth in Fisher v. Pauline Oil and Gas Co., 309 U.S. 294, 60 S. Ct. 535 (1940): "It is settled, however, that not only may the trustee avoid a lien (citations omitted), but the bankrupt may assert its invalidity as respects property set apart to him as exempt in the bankruptcy proceeding." 60 S. Ct. at 539.

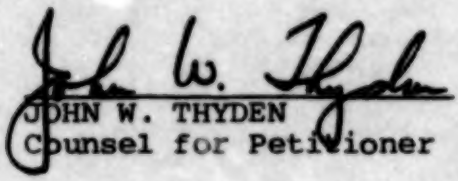
As further evidence of Congress' intent about including exempt property in section 67 a. one can compare it with section 67 c. In section 67 c. (5)[2/] one can see a limitation that does not have a counterpart in section 67 a.

2. § 67. Liens and Fraudulent Transfers.
***
(5) This subdivision c shall not apply to liens enforced by sale before the filing of the petition, nor to liens against property set aside to the bankrupt as exempt, not to liens against property abandoned by the trustee.....

regarding exempt property. The absence of such a limitation in section 67 a. strongly suggests Congress' intent that it cover exempt property.

Phillips v. Krakower was, and remains, good law. In trying to stretch its holding as the courts below have done, however, someone who has acted in reliance upon both the letter and the spirit of the law is being deprived of his property in a way not in keeping with either due process or equal protection of the law, to which all litigants, even bankrupts, are entitled.

Respectfully submitted



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Dated:

July 23, 1982